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## **Controlled Chaos with Consumer Welfare as the Winner – a Study of the Goals of Polish Antitrust Law**

by

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### ***Abstract***

This article presents the main issues relating to the goals of modern Polish competition law. It examines the relationship between the subject-matter of competition law, its function and its goals. It identifies various goals of competition law as well as their acceptance in the legal doctrine and jurisprudence. The study shows that the goals of Polish competition law have always been limited to enhancing efficiency and consumer welfare, with this latter term being understood in a post-Chicago-school fashions, rather than accordingly to its Chicago-school origin. This article shows how an 18-years competition law system, rather accidentally than deliberately,

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took the best ideas from both the American and the European legal tradition and mix them up into an incoherent, yet workable system of competition protection which is favourable towards efficient operations and, at the same time, safeguards consumers against exploitation and diminished choice.

**Classifications and key words:** competition, goals, public interest, efficiency, consumer protection, consumer welfare, competitor, economic freedom, restriction of competition.

## I. Introduction

Without a doubt, competition law statutes around the world have one thing in common – their substantive rules are drafted in a language so general and imprecise that they resemble far more the provisions of constitutional law<sup>1</sup>, than those of any other coherent body of law. Leaving any interpreter with one of the widest possible margins of discretion, this generality allows substantive provisions of antitrust law to remain unchanged for hundreds (US), a few dozen (EC) or several years (Poland) seeing as its rules may easily be adapted to changing economic, political and social circumstances and, of course, legal or economic concepts. The core rules remain unchanged yet their application evolves with time. How is it possible that the same provision, the same semantic structure, is understood and applied in a substantially different way? How can it be that the same conduct was first perceived as anticompetitive, then as procompetitive and it is now, in turn, viewed with caution? The answer to these questions, and indeed many others, lies in the goals of competition law. They influence the way the law in books becomes the law in action. It is the goals of competition law rather than its statutory provisions that determine which conduct is prohibited, which practice is allowed and how and when can a conduct find approval? Differences in goals are also responsible for divergent applications of identical, or highly similar, rules contained in various legal systems.<sup>2</sup>

Goals of competition law are rarely defined in statutory provisions. Even if they are, the room for interpretation is still great. Any references made to the goals of competition law are vague and can be understood in a great variety of ways. These goals can also be reflected in their country's legislative history, in the wording of their statutory prohibitions and in the economic and legal

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<sup>1</sup> Pointed out by the US Supreme Court as early as the judgment delivered in *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359–60 (1933).

<sup>2</sup> R. Whish, *Competition law*, Oxford 2001, p. 16.

doctrine. However, case-law remains the most important source of information concerning the goals of competition law seeing as it is cases that illustrate how the bodies responsible for the enforcement of competition law understand the scope of its prohibitions. Case-law determines which conduct restricts and which does not restrict competition as well as what circumstances are to be taken into account in a competition-related analysis. Even a localised lack of interest in a particular market practice shown by competition law enforcement bodies can be indicative of the goals of antitrust.

The purpose of this study is to examine the goals of modern Polish competition law. Its history began in 1990 with the entry into force of the Act of 24 February 1990 on Counteracting Monopolistic Practices and Protection of Consumers (hereafter, the Act of 1990)<sup>3</sup>. It has been subsequently repealed by the Act of 15 December 2000 on Competition and Consumer Protection (hereafter, the Act of 2000)<sup>4</sup> which was in turn replaced by the Act of 16 February 2007 on Competition and Consumer Protection (hereafter, the Act of 2007)<sup>5</sup>. These legislative changes have not resulted in any substantial modifications of the objectives pursued by Polish competition law<sup>6</sup>. This study does not cover the cartel regulations of 1930s<sup>7</sup> due to lack of continuity in the legal tradition nor, for reasons related to the economy, the Antimonopoly Act of 1987<sup>8</sup>.

## II. The subject-matter, the function and goals of competition law

Before examining the goals of Polish competition law, three interrelated yet separate concepts have to be identified that are often used interchangeably in this context, which leads to confusion between the object and the purpose of competition law.

Competition law (antitrust law) consists of a set of legal rules that protect the existence of competition seen here as the mechanism that regulates the

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<sup>3</sup> Act of 24 February 1990 on Counteracting Monopolistic Practices and Consumer Protection (consolidated text: Journal of Laws 1997 No 49, item 318 with amendments).

<sup>4</sup> Act of 15 December 2000 on Competition and Consumer Protection (consolidated text: Journal of Laws 2005 No 244, item 2080 with amendments).

<sup>5</sup> Journal of Laws 2007 No 50, item 331, with amendments.

<sup>6</sup> Judgment of the Supreme Court of 24 July 2003, I CKN 496/01, UOKiK Official Journal 2004, No 1, item 283.

<sup>7</sup> Act of 28 March 1933 on Cartels, Journal of Laws 1933, No 31, item 270 and Act of 13 July 1939 on Cartel Agreements, Journal of Laws 1939, No 63, item 418.

<sup>8</sup> Act of 28 January 1987 on counteracting monopolistic practices in national economy, Journal of Laws 1987 No 3, item 18.

functioning of the markets<sup>9</sup>. The subject-matter of competition law is the regulation of economic conduct of undertakings through a set of prohibitions. These are directed towards such business practices which are harmful to the competitive process itself<sup>10</sup>. Competition law does not care about the quality of the competitive process, which lies in the domain of the law on unfair competition that determines the prohibited methods of market rivalry. Competition law is also not interested in market distortions resulting from state interventions taking the form of various subsidies that are damaging to the equality of competition. This is the subject-matter of state-aid rules.

The function of competition law is the protection of competition against distortions resulting from the behavior of professional market participants, that is, undertakings. Competition, the preservation of competition, competition restraint etc. can be understood differently depending on the goals to be achieved through competition law. The goals of competition law explain why competition is protected, as well as why are certain practices considered to be anticompetitive or procompetitive. It is the goals of competition law that form the background of decisions based on its substantive provisions because they determine their interpretation and application. The function of competition law is constant and identical for all legal systems that encompass it. Competition is and should be protected because it is beneficial for consumers, the economy and therefore for the whole society. In contrast, the goals (objectives) of competition law are various and differ among jurisdictions<sup>11</sup>, because a wide variety of benefits is associated with competition, ranging from socio-political to purely economic<sup>12</sup>.

A quick look at the opinions expressed by Polish scholars shows a variety of views on this issue. They range from the protection of the constitutional freedom of economic activity<sup>13</sup> to consumer interests and welfare (albeit not

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<sup>9</sup> For definitions of competition (antitrust) law see also A. Jurkowska, *Porozumienia kooperacyjne w świetle wspólnotowego i polskiego prawa ochrony konkurencji. Od formalizmu do ekonomizacji*, Warszawa 2005, p. 34.

<sup>10</sup> This is often referred to as protection of the freedom of competition, see M. Stefaniuk, *Publicznoprawne reguły konkurencji*, Lublin 2005, p. 14.

<sup>11</sup> For an outline of potential objectives, which may be pursued by competition law see R. Whish, *Competition...*, p. 15–19; L. A. Sullivan, W. Grimes, *The law of antitrust...*, p. 9–16; V. Korah, *An introductory guide to EC competition law and practice*, Oxford 2004, p. 9–17; K. Cseres, *Competition law and consumer protection*, The Hague, p. 244–306; M. Monti, *EC competition law*, Cambridge 2007; p. 20–52; D. Miąsik, *Reguła rozsądku w prawie antymonopolowym. Studium prawnoporównawcze*, Zakamycze 2004, p. 41–52.

<sup>12</sup> E. Kosiński, *Rodzaje i zakres sektorowych wyłączeń zastosowania ogólnych reguł ochrony konkurencji*, Poznań 2007, p. 30.

<sup>13</sup> Z. Jurczyk, “Cele polityki antymonopolowej w teorii i praktyce” [in:] C. Banasiński, E. Stawicki (eds), *Konkurencja w gospodarce współczesnej*, Warszawa 2007, p. 36.

within the meaning adopted by the Chicago-School)<sup>14</sup>, separated in the middle by the approach pursued by the Harvard-School<sup>15</sup> and the concept of economic efficiency<sup>16</sup>, including allocative efficiency considered to be the sole objective of competition law<sup>17</sup>.

A quick look at Polish jurisprudence shows a state of almost total chaos when it comes to the topic of this paper. The aforementioned notions of the subject-matter, the function and the goals of competition law have been used quite freely, and totally interchangeably, to provide a background for particular decisions and judgments that should have been in fact determined with reference to the goals of competition law only.

In some cases reference to the content of Article 1 of the Act of 1990, of the Act of 2000 and of the Act 2007 was repeated (protection of competition, undertakings and consumers)<sup>18</sup>. In those instances, the subject-matter, the function and the goals of competition law were mixed up. In other cases, statements can be found that the purpose of competition law is “to secure conditions for the development of competition” and “to secure the protection of consumer rights”<sup>19</sup>, even though the first purpose reflects the function of competition law while the second purpose is to general. This is followed by cases containing statements that the goal of competition law is to protect market competition seen as an “institutional phenomenon” which is the basis of free market economy<sup>20</sup>. Other examples include declarations pursuant to which “the good protected under the act is the existence of competition as the atmosphere in which economic activity is conducted” while the protection

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<sup>14</sup> D. Miąsik, *Regula...*, p. 429.

<sup>15</sup> E. Modzelewska-Wąchal, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2002, s. 10.

<sup>16</sup> K. Kohutek, [in:] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2008, p. 43; Z. Jurczyk, “Cele polityki...”, p. 36.

<sup>17</sup> E. Kosiński, “Cele i instrumenty antymonopolowej interwencji państwa w gospodarce” (2004) 3 *Kwartalnik Prawa Publicznego* 40–41.

<sup>18</sup> Judgment of the Supreme Court of 24 July 2003, I CKN 496/01, UOKiK Official Journal 2004, No 1, item 283.

<sup>19</sup> Judgment of the Supreme Court of 24 May 2004, III SK 41/04, (2005) 13 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 199; judgment of the Supreme Court of 10 May 2007, III SK 24/06, (2008) 9–10 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 152.

<sup>20</sup> Decision of the President of UOKiK of 4 July 2008, DOK-3/2008; decision of the President of UOKiK of 31 December 2007, DOK-99/2007; decision of the President of UOKiK of 7 April 2008, DOK-1/2008; decision of the President of UOKiK of 7 April 2008, DOK-1/2008; Judgment of the Antimonopoly Court of 5 December 2001, XVII Ama 8/01, Lex 56500; judgment of the Antimonopoly Court of 27 June 2001, XVII Ama 92/00, Lex 55944, judgment of the Antimonopoly Court of 6 June 2001, XVII Ama 78/00, Lex 56162; judgment of the Court of Competition and Consumer Protection of 22 February 2003, XVII Ama 3/02, unpublished.

of consumers (as purchasers of goods and services offered under competitive conditions) is executed “by the way”<sup>21</sup>. Statements can even be found that “the task of the antimonopoly authorities and antitrust law is to lead to a total (unlimited) and effective competition on the relevant market”<sup>22</sup>. Sometimes the competition authority and the courts seem to follow the approach pursued by the Harvard school considering “the operation on the market of many independent undertakings, offering their products to consumers at a different price, quality and quantity” to be a prerequisite for competition. “Only if such market conditions are met can a consumer, by making a choice, influence the conduct of undertakings rewarding those, whose offers are beneficial for consumers and eliminating those, who are not competitive”.

Referencing preparatory materials is not very helpful either. For example, the Government’s draft of the 2007 Act was justified as follows “the act is an effective instrument of competition protection” (p. 1) and “basic goals of the act are the protection of undertakings and consumers in the public interest” (p. 4). This fact clearly shows that even the legislator does not really know: why is the regulation of competition protection desired? Why is competition protected? And, what goals should be achieved through competition law?

One of the most interesting issues surrounding competition law and the economic order, namely, to identify, to describe and to execute the goals of competition law is thus left to the bodies responsible for enforcing the substantive provisions of competition law and to the legal doctrine.

### III. In search of guidance – the title and the preamble

For EU lawyers, it is quite natural to refer to preambles of European regulations or directives in search of guidance as to the intentions behind a specific piece of legislation. However, preambles are not common in the Polish legal tradition. Therefore, the fact that the Act of 1990 contained a preamble, which preceded its substantive provisions, emphasised the importance attributed to competition law in a country undergoing an economic and legal transition. Although not binding, the preamble was considered to be an important source of inspiration for the competition authority and courts, and was considered to be capable of influencing the interpretation of the substantive provisions

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<sup>21</sup> Judgment of the Court of Competition and Consumer Protection of 16 November 2005, XVII Ama 97/04, published in: UOKiK Official Journal 2006, No 1, item 16.

<sup>22</sup> Decision of the President of the UOKiK of 10 October 2005, DOK-127/2005.

of this Act<sup>23</sup>. The preamble spoke of the following “goals”: 1) securing the development of competition, 2) the protection of undertakings against monopolistic practices and, 3) the protection of consumer interests.

The wording of the preamble suggested that all three goals were of equal importance. However, it was established early on that the first “goal” was of most importance, even though it is clear that the first “goal” listed in the preamble was not really a goal but rather, a legislative description of the function of the Act<sup>24</sup>. Contrary to what is generally considered to be the main function of competition law (“the protection of competition”), the wording of the preamble signified that, to an economy moving away from state-control and towards the free-market, the creation and maintenance of a competitive environment was of greatest importance<sup>25</sup>. Putting aside the character of this phrase, “securing the development of competition” could have been understood as directing the activities of the competition authority against companies holding large market shares (strong market positions) since limiting their activities through the intervention of competition authorities led to the opening of markets for new entrants. This, in turn, implies that the prohibitions stipulated in the Act of 1990 should be applied against those practices which were directed against the competitive structure of the market<sup>26</sup>. At the time when the Act of 1990 was adopted, the economy was dominated by state-, or formerly state-owned enterprises, which were not used to competitive pressure. In such circumstances, the emphasis put on the development of competition allowed the markets to be freed and competition to be introduced as the main driving force of the economy. The development of competition meant an increase in the available offers<sup>27</sup> and, in turn, forced existing market operators to act more efficiently to satisfy consumer needs<sup>28</sup>.

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<sup>23</sup> S. Gronowski, *Ustawa antymonopolowa – komentarz*, Warszawa 1999, p. 22; D. Miąsik, *Reguła rozsądku...*, p. 363; Judgment of the Antimonopoly Court of 11 December 1996, XVII Ama 59/96, LEX no 56166; judgment of the Supreme Court of 29 May 2001, I CKN 1217/98, (2002) 1 *Orzecznictwo Sądu Najwyższego – Izba Cywilna*, item 13.

<sup>24</sup> S. Gronowski, *Ustawa...*, p. 19; T. Skoczny, “Dostosowanie prawa polskiego do prawa wspólnotowego w zakresie materialnego prawa antymonopolowego” [in:] P. Saganek, T. Skoczny (eds), *Wybrane problemy dostosowania prawa polskiego do prawa Unii Europejskiej*, Warszawa 1999, p. 146; D. Miąsik, *Reguła rozsądku...*, p. 363; judgment of the Antimonopoly Court of 26 September 1990, XV Amr 1/90, (1992) 1 *Wokanda*; Judgment of the Antimonopoly Court of 29 December 1993 r., XVII Amr 42/93, (1994) 5 *Wokanda*; Judgment of the Antimonopoly Court of 24 January 1991, XV Amr 8/90, (1992) 2 *Wokanda*.

<sup>25</sup> D. Miąsik, *Reguła rozsądku...*, p. 364.

<sup>26</sup> A Fornalczyk, “Competition law and policy in Poland in 1990–95” [in:] T. Skoczny (ed.), *Harmonisation of the polish competition legislation with competition rules of the European Communities, summary and recommendations*, Warszawa 1997, p. 37.

<sup>27</sup> T. Skoczny, *Dostosowanie...*, p. 146.

<sup>28</sup> I. Wiszniewska, *Granice kartelowo-prawne licencji patentowych*, Wrocław 1990, p. 50.



There was no other way to force efficiency on undertakings that were used to operating in a state-controlled economy characterised by severe shortages of all commodities and most of the services.

However, this is only one possible reading of the first and most important goal of the Act of 1990. It would be equally correct to understand the phrase “securing the development of competition” as meaning that not only should the markets be kept open for all potential entrants, but that the rivalry among independent undertakings and freedom of economic activity are the key concepts connected to the development of competition. This alternative approach finds supports in the second goal of this Act, that is, “the protection of undertakings against monopolistic practices” (here the term “goals” was used correctly). One may be tempted to consider this part of the preamble to suggest that the competition authority had the duty to protect the interests of undertakings. This falls short of protecting competitors against competition. However, the preamble warranted undertakings with protection through the intervention of the competition authority only to the extent, to which the harm to their economic interests resulted from anticompetitive practices and not from competition itself<sup>29</sup>. This, in turn, supports the thesis that the protection of competitors has never been considered as one of the legislative goals of Polish competition law.

The last of the goals of the Act of 1990 stipulated in its preamble referred to the protection of consumer interests. Similarly to safeguarding the interests of undertakings, consumers were protected only against anticompetitive practices. However, referral to consumer interests may indicate that the conduct of undertakings should be assessed in the light of its impact on this group of market participants. If consumer protection was to be taken into consideration when applying the substantive provisions of the Act of 1990, what was bad for consumers ought to restrict competition, while what was good for them should not generally be prohibited. It was also suggested that consumer needs may only be satisfied by efficient undertakings<sup>30</sup> and that their interests may only be harmed through the exercise of market power<sup>31</sup>.

In contrast to the Act of 1990, neither the Act of 2000 nor the Act of 2007 has a preamble. Both Acts share the same title (“Act on competition and consumer protection”) which suggests that they were intended to perform two functions: protect competition and protect consumers. It is difficult to ascertain what role should the protection of consumers play within the ambit of antitrust rules contained in the act. Among the duties of the competition

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<sup>29</sup> D. Miąsik, *Reguła rozsądku...*, p. 365.

<sup>30</sup> I. Wiszniewska, *Granice...*, p. 50.

<sup>31</sup> M. Tadeusiak, “Competition and consumer protection on monopolized markets in the light of antimonopolistic decisions in 1990–1995” [in:] T. Skoczny (ed.), *Harmonisation...*, p. 75.

authority lays the protection of consumers against practices infringing their collective interests (due to the implementation of the EC Directive 98/27). However, a reference to consumer protection was made already in the original version of the Act of 2000, before the implementation of the 98/27 Directive. The title of both Acts suggests therefore that consumer interests may play an important role in the application of the substantive antitrust prohibitions stipulated in both acts, thus influencing the goals of Polish competition law.

#### IV. The role of the public interest

An important role in determining the goals of Polish competition law has been played by the concept of “public interest”. It has been consistently held that the substantive provisions of the Act of 1990, the Act of 2000 and the Act of 2007 may only be applied when the conduct under examination harms not merely an individual, but public interest.

Initially, the Act of 1990 did not mention the public interest. However, in one of its first judgments, the Antimonopoly Court declared that “only those cases may be examined under the provisions of the act which infringe the public interest in the development of competition, protection of undertaking and consumer interest against anticompetitive practices”<sup>32</sup>. The development of this doctrine led to the creation of a new substantive condition that had to be met when applying the provisions of the 1990 Act namely that the competition authority was obliged to determine and explain how the conduct under investigation infringed, or threatened to infringe, the public interest<sup>33</sup>. Reference to the public interest can be found in Article 1 of the Act of 2000 as well as the Act of 2007.

What derives from the case-law based on the application of the Act of 1990 is that a harm to the public interest could be found where “the harmful effects of the conduct violating the Antimonopoly Act were felt by a wider number of market participants”<sup>34</sup>, sometimes supported by a more general statement – “or

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<sup>32</sup> Judgment of the Antimonopoly Court of 24 January 1991, Amr 8/90, (1992) 2 *Wokanda*.

<sup>33</sup> Judgment of the Antimonopoly Court of 3 August 1994, XVII Amr 15/94, (1995) 5 *Wokanda*; judgment of the Antimonopoly Court of 6 June 2001, XVII Ama 78/00, Lex no 56162.

<sup>34</sup> Judgment of the Antimonopoly Court of 29 December 1993, XVII Amr 42/93, (1994) 5 *Wokanda*, p. 56; judgment of the Supreme Court of 29 May 2001, I CKN 1271/98, (2002) 1 *Orzecznictwo Sądu Najwyższego – Izba Cywilna*, item 13; judgment of the Supreme Court of 28 January 2002, I CKN 112/99, (2002) 11 *Orzecznictwo Sądu Najwyższego – Izba Cywilna*, item 144.

if those actions resulted in other negative effects on the market”<sup>35</sup>. Ultimately, the development of case-law attached greater emphasis to the former criterion of “harm felt by a wider number of market participants”, which excluded the application of the substantive provisions of Polish competition law in cases, where only one company or consumer was harmed or complained to the competition authority. The doctrine, which developed on the basis of this undertakings of the public interest, did not see every conduct that literally infringed the substantive provisions of the Act of 1990 as a restriction of competition and thus, mandating an intervention by the competition authority<sup>36</sup>. The conduct under examination had to make an impact on the competitive process<sup>37</sup>. This in turn makes it possible to suggest that it was not the purpose of the Act of 1990 to protect an individual undertaking against competition. Even though competition was viewed as the process of rivalry, a simple limitation of this rivalry was not considered as uncompetitive. Similarly, a violation of contractual obligations was not considered as uncompetitive – not every breach of contract results from a restrictive practice – and even if such a breach fitted into the definition of one of the restrictive practices stipulated in the Act of 1990, it was not prohibited because it did not infringe the public interest<sup>38</sup>.

A rational need to separate trivial cases from important ones can help explain the fact that the public interest doctrine developed into the most important precondition for the application of the Act of 1990. Reference to this concept constituted an easy method for eliminating from the scope of scrutiny all those cases which harmed the economic interests of undertakings filing complaints to the competition authority. It allowed the competition authority and the courts to put aside cases without an appreciable restriction of competition as well as cases, where such a negative effect was highly unlikely to be established since the restraint in question was not a restriction of competition but merely an infringement of the economic interests of the applicant resulting from competition itself. For example, cases concerning increases in rent affecting business owners were dismissed as negatively affecting individual interests only<sup>39</sup>.

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<sup>35</sup> Judgment of the Antimonopoly Court of 29 December 1993, XVII Amr 42/93, (1994) 5 *Wokanda*; judgment of the Supreme Court of 27 August 2003, I CKN 527/01, Lex No 137525.

<sup>36</sup> Judgment of the Antimonopoly Court of 29 December 1993, XVII Amr 42/93, (1994) 5 *Wokanda*, p. 56. Judgment of the Antimonopoly Court of 24 January 1991, XV Amr 8/90, (1992) 2 *Wokanda*.

<sup>37</sup> Judgment of the Supreme Court of 29 May 2001, I CKN 1217/98, 2002 (1) *Orzecznictwo Sądu Najwyższego – Izba Cywilna* item 13.

<sup>38</sup> Judgment of the Antimonopoly Court of 24 January 1991, XV Amr 8/90 (1992) 2 *Wokanda*.

<sup>39</sup> Judgment of the Antimonopoly Court of 29 December 1993., XVII Amr 42/93, (1994) 5 *Wokanda*; judgment of the Antimonopoly Court of 24 January 1991 r., XV Amr 8/90, (1992) 2 *Wokanda*.

Although the Act of 1990 was repealed in 2000, the public interest criterion has been interpreted in a similar manner in the Acts of 2000 and in the Act of 2007. However, an increasing number of cases can be found where the courts departed from the aforementioned approach to the public interest. The courts now seem to consider that the public interest is violated by any competition restricting practice, irrespective of the number of market participants that have been affected by it<sup>40</sup>. Pursuant to this growing body of case-law, a given conduct violates public interests if it restricts competition. One of the clearest examples of this development can be found in the judgment concerning the refusal by the Polish dominant incumbent telecoms operator to negotiate and sign interoperability agreements with independent dial-up internet providers<sup>41</sup>. The Antimonopoly Court ruled in this case that “the existence and development of competition on all relevant markets is in the public interest, thus any activity which restricts the creation or development of competition infringes the public interest”. A similar approach was adopted in a case, which concerned blocking telecoms access for foreign companies providing teletext services<sup>42</sup>, where the Antimonopoly Court ruled that the “elimination of foreign undertakings from the Polish market restricted competition and therefore infringed the public interest”. This approach has been supported by the Supreme Court for a notable time<sup>43</sup>.

## V. Goals of Polish competition law

### 1. Enhancing economic efficiency

The enhancement of economic efficiency has been advocated as at least one of the goals of competition law almost since the beginning of the history of modern Polish antitrust law. The fact was emphasised that the main goal of

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<sup>40</sup> Judgment of the Supreme Court of 5 June 2008, III SK 40/07, not yet published.

<sup>41</sup> Judgment of the Court of Competition and Consumer Protection of 21 March 2005, XVII Ama 16/04, published in: UOKiK Official Journal 2005, No 2, item 27.

<sup>42</sup> Judgment of the Court of Competition and Consumer Protection of 18 December 2002, XVII Ama 19/2001, UOKiK Official Journal 2003, No 2, item 260.

<sup>43</sup> Judgment of the Supreme Court of 26 February 2004, III SK 2/04, (2004) 4 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 343; judgment of the Supreme Court of 26 February 2004, III SK 1/04, (2004) 18 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 323; judgment of the Supreme Court of 12 May 2004, III SK 44/04, (2005) 9 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 136; judgment of the Supreme Court of 5 June 2008, III SK 40/07, not yet published.

the Act of 1990 was to protect competition considered to be a mechanism for improving the effectiveness of the economy<sup>44</sup>. It was assumed that undertakings interested in maximising their profits must lower prices and introduce new products in order to attract consumers since otherwise, their customers would be taken by their competitors. Competition was seen as a force exercising pressure on existing market operators to improve their productive and dynamic efficiency<sup>45</sup>. Restrictions of competition were considered to lead to less efficient market operations – the main negative effect associated with monopolistic practices<sup>46</sup>. The main source of those practices was the “existence of economic structures abusing their market power”<sup>47</sup>. While the Act of 2000 was in force, some authors supported the thesis that allocative efficiency should be its only goal<sup>48</sup>. At the same time, other commentators advocated a more balanced approach declaring that the Act of 2000 was designed to protect competition as a mechanism that forms the cornerstone of the economy, while the protection of consumers and competitors should be taken into account only indirectly<sup>49</sup>. This position is compatible with the consumer welfare standard<sup>50</sup> and the emphasis given to the impact of the conduct of an undertaking on the quality and price of its products<sup>51</sup>. The protection of competition, considered to be the mechanism facilitating the increase of efficiency as well as the source of progress and development, is deemed to be the purpose of the Act of 2007; the protection of consumers and undertaking against exploitative practices should be realised only indirectly<sup>52</sup>.

How did the competition authority and the courts respond to these suggestions? Even as early as the first half of the 1990s, the protection of the market was occasionally hailed as “the main goal of the act”<sup>53</sup>. This supported the thesis that an intervention by the competition authority was justified in

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<sup>44</sup> T. Skoczny, *Dostosowanie...*, p. 144–145; T. Skoczny, *Ustawy antymonopolowe krajów postsocjalistycznych*, Warszawa 1992, p. 11; I. Wiszniewska: *Granice...*, p. 50.

<sup>45</sup> S. Gronowski, *Polskie prawo...*, p. 21.

<sup>46</sup> I. Wiszniewska, *Granice...*, p. 314.

<sup>47</sup> P. Podrecki, *Porozumienia monopolistyczne i ich cywilnoprawne skutki*, Kraków 2000, p. 14; S. Gronowski, *Ustawa...*, p. 5.

<sup>48</sup> E. Kosiński, “Cele i instrumenty...” , p. 40–41.

<sup>49</sup> R. Janusz, M. Sachajko, T. Skoczny, “Nowa ustawa o ochronie konkurencji i konsumentów” (2001) 3 *Kwartalnik Prawa Publicznego* 181.

<sup>50</sup> A. Jurkowska, T. Skoczny, “Wyłączenie określonych porozumień specjalizacyjnych i badawczo-rozwojowych spod zakazu porozumień ograniczających konkurencję” (2003) 1 *Przegląd Prawa Handlowego* 17.

<sup>51</sup> P. Dębowski, “Wyłączenie określonych porozumień wertykalnych spod zakazu porozumień ograniczających konkurencję” (2003) 2 *Przegląd Prawa Handlowego* 7.

<sup>52</sup> K. Kohutek, [in:] K. Kohutek, M. Sieradzka, *Ustawa...*, p. 42–43.

<sup>53</sup> Judgment of the Antimonopoly Court of 3 August 1994, XVII Amr 15/94, (1995) 5 *Wokanda*.

those instances, where the conduct under examination affected the allocative functions of the market. This opinion is strengthened by stressing that the protection of competition “consists of actions against abuses of market power”<sup>54</sup> resulting from the exploitation of their market position<sup>55</sup>.

The Antimonopoly Court often repealed decisions of the competition authority because they lacked a market power analysis (albeit understood not as a power over prices but as market share)<sup>56</sup>. Pursuant to this reasoning, undertakings without market power can not infringe competition rules by unilateral conduct. A market share of 7% did not support the assumption that the undertaking concerned had sufficient power<sup>57</sup>. In another case, the Court ruled that on the local market of commercial property, none of the undertakings had a dominant position because the scrutinised companies controlled only 20% of the market where 12 other entities were active. This meant that “a relatively small market share did not allow [the undertaking concerned] to unilaterally impose contractual terms irrespective of the conduct of other competitors or their customers”<sup>58</sup>. However, market power is still treated as equal to significant market share in the Acts of 2000 and the Act of 2007. Therefore, an agreement concerning the withdrawal of a certain type of product from the market was held to be anticompetitive because it made an impact on the whole petrol market seeing as it was concluded between both Polish oil companies<sup>59</sup>.

In a few recent decisions the competition authority emphasised that the rivalry between undertakings results in “optimal economic benefits from the sale of goods and services and maximum satisfaction of consumer needs at the lowest possible price”<sup>60</sup>. This shows a great respect for allocative efficiency. It also confirms that even though competition is still equated with rivalry among independent undertakings, competition law is concerned with the effects of such rivalry and not with the process itself. The fact that the competition authority did not mention efficiency concerns in a direct way in the past, does

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<sup>54</sup> Ibidem.

<sup>55</sup> Judgment of the Antimonopoly Court of 29 December 1993, XVII Amr 42/93, published in: (1994) 5 *Wokanda*.

<sup>56</sup> Judgment of the Antimonopoly Court of 9 April 1997, XVII Ama 4/97, Lex 56458; judgment of the Antimonopoly Court of 21 January 1998, XVII Ama 55/97, (1999) 2 *Wokanda*.

<sup>57</sup> Judgment of the Antimonopoly Court of 21 May 1993, XVII Ama 9/93, (1993) 12 *Wokanda*.

<sup>58</sup> Judgment of the Antimonopoly Court of 29 December 1993, XVII Amr 42/93, (1994) 5 *Wokanda*.

<sup>59</sup> Decision of the President of the UOKIK of 31 December 2007, DOK-99/2007.

<sup>60</sup> Decision of the President of the UOKIK of 7 April 2008, DOK-1/2008; decision of the President of the UOKIK of 4 July 2008, DOK-3/2008; decision of the President of the UOKIK of 29 December 2006, DOK-164/06.

not mean that they were irrelevant. The application of competition law to vertical restraints illustrates that fact best.

As early as in the early 1990s, and contrary to the dominant trend in the Community at the time, the Polish Antimonopoly Court and the competition authority assessed vertical restraints in a fashion more similar to the approach employed in the US<sup>61</sup>. Market power was vied as the main criterion for intra-brand restraints to be seen as anticompetitive<sup>62</sup>. Most of the cases that ended in a decision or a judgment declaring certain restraints as uncompetitive concerned distribution networks organised by dominant<sup>63</sup> or monopolistic<sup>64</sup> undertakings. In cases concerning companies with high market shares, vertical restraints were viewed as unreasonable restraints of competition<sup>65</sup> that allowed the parties concerned to set prices at higher levels or delay their lowering<sup>66</sup>. In contrast, when the undertaking applying vertical restraints was not dominant, beneficial effects of vertical restraints for competition were emphasised, in particular, consumer benefits<sup>67</sup>. The courts took into account whether the result of the conduct improved consumer welfare thanks to better availability and the impact of vertical restraints on prices. Competition could be restricted only through market foreclosure. Market shares of around 30% were considered to be not high enough to foreclose a market, particularly if market pressure exercised by foreign imports was high<sup>68</sup>. As a result, vertical restraints were held not to restrict competition *per se*. A full inquiry was necessary<sup>69</sup>.

The favourable treatment of vertical restraints adopted under the Act of 1990 has continued seeing as the intervention of the competition authority under the Acts of 2000 and the Act of 2007 remained limited to vertical price

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<sup>61</sup> I. Wiszniewska, *Granice...*, p. 83.

<sup>62</sup> See P. Podrecki, *Porozumienia monopolistyczne...*, p. 140.

<sup>63</sup> With market shares at 60% to 90% – judgment of the Antimonopoly Court of 21 July 1992, XVII Amr 12/92, (1993) 1 *Wokanda*; judgment of the Antimonopoly Court of 6 December 1993, XVII Amr 35/93, (1993) 7 *Wokanda*.

<sup>64</sup> Judgment of the Antimonopoly Court of 6 December 1993, XVII Amr 35/93, (1993) 7 *Wokanda*.

<sup>65</sup> Judgment of the Antimonopoly Court of 21 July 1992, XVII Amr 12/92, (1993) 1 *Wokanda*.

<sup>66</sup> Judgment of the Antimonopoly Court of 6 December 1993, XVII Amr 35/93, (1993) 7 *Wokanda*.

<sup>67</sup> Judgment of the Antimonopoly Court of 8 January 1997, XVII Ama 65/96, unpublished.

<sup>68</sup> Judgment of the Antimonopoly Court of 25 June 1997, XVII Ama 19/97, (1998) 7 *Wokanda*.

<sup>69</sup> Judgment of the Antimonopoly Court of 10 September 1992, XVII Amr 15/92, (1993) 2 *Wokanda*; judgment of the Antimonopoly Court of 9 April 1997, XVII Ama 4/97, Lex 56458.

fixing<sup>70</sup>. Such contracts were held to be agreements that have the restriction of competition as their object because “the price set is set to the obvious detriment of the consumer”<sup>71</sup>.

In cases where exclusivity clauses were examined, the competition authority emphasised that they did not restrict competition *per se*. Exclusivity clauses were said to restrict competition only in specific circumstances when they restrict market access or eliminate undertakings from the market<sup>72</sup>. In a particular case, an exclusive dealing clause affecting the yeast market, which was applied by a major producer, was considered as anticompetitive because the supplier controlled over 50% of the market. Other producers were therefore foreclosed from the market. However, the lack of a coherent approach to the goals of Polish competition law is shown perfectly by the, fact that the exclusivity clause was also declared to be anticompetitive since it “restricted the freedom of dealers and made it impossible for them to compete with other multi-brand dealers”.

No restriction of competition was found in a case concerning an agreement between one of the major electric appliances producers and its largest dealer<sup>73</sup>. The competition authority found that this agreement was not discriminatory, even though it gave higher rebates to this particular dealer only, and ruled that it did not create different conditions for competition among the dealers of this supplier. Pursuant to the reasoning of the competition authority, the supplier was entitled to reward the largest and most active member of its distribution network. Rebates applied in this case did not foreclose access to the market for other producers.

In another case<sup>74</sup>, the competition authority found no restriction of competition in the conduct of the major issuer of service vouchers who was accused of abusing its dominant position by selling vouchers at prices lower than their nominal value and by entering into exclusivity agreements with stores accepting those vouchers. Having analysed the market, the competition authority ruled that the number of outlets accepting these vouchers, was the decisive factor for the purchase rather than the amount of the discount offered. Agreements between stores and the issuers of vouchers were intended to “increase turnover and attract more customers”. Apart from that, the costs

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<sup>70</sup> Decision of the President of the UOKIK of 7 April 2008, DOK-1/2008; decision of the President of the UOKIK of 18 September 2006, DOK-107/06.

<sup>71</sup> Decision of the President of the UOKIK of 7 April 2008, DOK-1/2008; decision of the President of the UOKIK of 4 July 2008, DOK-3/2008 .

<sup>72</sup> Decision of the President of the UOKIK of 29 December 2006, DOK-164/06.

<sup>73</sup> Decision of the President of the UOKIK of 1 August 2006, DOK-87/2006.

<sup>74</sup> Decision of the President of the UOKIK of 19 December 2006, DOK-158/06.



borne by the stores accepting the vouchers made them reluctant to accept vouchers originating from more than one source.

The importance of efficiency was directly emphasised by the Supreme Court at least on a few occasions. The Court ruled that “an agreement between competitors organises the market in such a way that it sends false signals as to the price, demand, number of potential seller or producers” and under such circumstances, the market may no longer perform its functions normally<sup>75</sup>. Although those functions were not defined, reference to the way the market operates indicates that allocative efficiency is at least one of the goals of Polish antitrust law. In a case concerning interoperability agreements concluded with independent dial-up internet providers, the Supreme Court went even further by declaring that “the Act of 2000 aims at securing the existence of competition on the market as the optimal way of allocating resources among the members of the society”<sup>76</sup>. Pursuant to the reasoning of the Supreme Court, competition improves the efficiency of the whole economy because it forces undertakings to satisfy consumer needs and care for their interests by offering better products, additional services, new technologies, a competitive range of prices, etc. Thus, even though lawyers will always define competition as the rivalry between independent undertakings, competition law is not concerned as much about the rivalry itself as it is concerned about its effects. However, goals of competition law are not limited to enhancing efficiency only. Pursuant to the reasoning of the Supreme Court, competition is restricted if the conduct at stake leads to a decrease in production or sales, to higher prices as well as when it limits consumer choice<sup>77</sup>. While this opinion is in clear support of efficiency concerns, it is interesting to note that the Supreme Court defined consumer welfare quite differently to the Chicago-school. Consumer welfare is not limited to the concept of total welfare of the society. The level of consumer choice plays an important role in qualifying a certain conduct as anticompetitive. However, the fact that a given practice deprived consumers of an offer that was previously available does not mean that it is illegal since it may be justified pursuant to domestic rules equivalent of Article 81(3) EC. Competition is desirable and worthy of protection as long as it brings benefits to consumers. As a result, a given practice may still be held as anticompetitive, even if it increases efficiency by lowering costs or improving productivity, if it lacks consumer benefits.

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<sup>75</sup> Judgment of the Supreme Court of 12 May 2004, III SK 44/04, (2005) 9 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 136.

<sup>76</sup> Judgment of the Supreme Court of 19 October 2006, III SK 15/06, (2007) 21–22 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 337.

<sup>77</sup> *Ibidem*.

At this point in the article, it is possible to notice that so far production and dynamic efficiencies have not been mentioned. This does not mean that those types of efficiencies are irrelevant to Polish competition law. On the contrary, this fact shows that the Polish competition authority does not get involved in practices that are either procompetitive *per se* or can be easily justified under the rule of reason analysis such as: R&D, joint-production or technology transfer agreements. Moreover, such agreements benefit from national group exemptions. That fact constitutes – at last – an obvious indication that enhancing efficiency is an important goal of Polish competition law that is recognised indirectly by the legislator<sup>78</sup>.

## 2. Consumer welfare and consumer detriment

All<sup>79</sup> of the official titles of the statutes that form the foundation of the Polish competition law system directly referred to the protection of consumer interests; so did the preamble of the Act of 1990. The negative effects that anticompetitive practices can have in respect of consumers were also noted by the legal doctrine<sup>80</sup>. Reference to the protection of consumers was made in several of the aforementioned cases<sup>81</sup> even though it was not of any practical importance there. In other cases, the protection of consumers was considered as a secondary (subsidiary) goal of Polish competition law<sup>82</sup> since “only undistorted competition gives both undertakings and consumers a guarantee of their constitutional rights to economic freedom and protection of their rights”<sup>83</sup>.

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<sup>78</sup> For a detailed study of block exemptions in force in Polish legal system see A. Jurkowska, T. Skoczny (eds), *Wylaczenia grupowe spod zakazu porozumien ograniczajacych konkurencje we Wspolnocie Europejskiej i w Polsce*, Warszawa 2008.

<sup>79</sup> The title of the Act of 1990 was amended in 1995 by adding the phrase “and protection of competition”.

<sup>80</sup> I. Wiszniewska, *Granice...*, p. 314.

<sup>81</sup> Judgment of the Supreme Court of 24 July 2003, I CKN 496/01, UOKiK Official Journal 2004, No 1, item 283; Judgment of the Supreme Court of 24 May 2004, III SK 41/04, (2005) 13 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 199; judgment of the Supreme Court of 10 May 2007 r., III SK 24/06, (2008) 9-10 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 152.

<sup>82</sup> Judgment of the Court of Competition and Consumer Protection of 16 November 2005, XVII Ama 97/04, UOKiK Official Journal 2006, No 1, item 16.

<sup>83</sup> Decision of the President of the UOKiK of 4 July 2008, DOK-3/2008; decision of the President of the UOKiK of 31 December 2007, DOK-99/2007; decision of the President of the UOKiK of 7 April 2008, DOK-1/2008; decision of the President of the UOKiK of 29 December 2006, DOK-164/06.

Nevertheless, direct references to consumer interests was made in a significant number of cases where a detriment to these interests led to the finding that the scrutinised conduct was seen as anticompetitive. In a recent case cornering an increase in connection charges applicable to international telecoms services provided by independent operators, the competition authority ruled that such an increase eliminated competition from independent providers since “rationally behaving consumers will not be interested in buying more expensive services of a similar quality”<sup>84</sup>. In another case, an agreement to cease production of a certain type of petrol was declared as anticompetitive because it “deprived consumers of the supply of a product that they were still interested in”<sup>85</sup>. In yet another case, the competition authority ruled that a practice of setting resale prices eliminated competition between DIY stores with negative effects felt mostly by consumers<sup>86</sup>.

This approach was also endorsed, at least in some cases, by the Antimonopoly Court which ruled that a restriction of competition may take the form of depriving consumer of the “option to freely choose the service provider”<sup>87</sup>. In another case, the Court ruled that uncertainty as to the potential reaction of competitors makes it difficult for companies to undertake actions to the detriment of consumers<sup>88</sup>. As a result, agreements which limit or eliminate such risk are restrictive of competition since they allow undertakings to exploit consumers.

Pursuant to the case-law of the Supreme Court, practices that restrict the ability of consumers “to choose the type and standard as well as the price of the service”<sup>89</sup> are seen as anticompetitive. The importance of consumer choice and consumer detriment was also emphasised in cases concerning horizontal price fixing<sup>90</sup> and in relation to an agreement that contained exclusivity clauses, which was concluded between a motorway operator and towing companies<sup>91</sup>.

Pursuant to this body of case-law, consumer welfare is understood as providing consumers with the widest possible choice of goods and services at the lowest possible prices and the highest possible quality. However, the

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<sup>84</sup> Decision of the President of the UOKiK of 30 May 2006, DOK-53/06.

<sup>85</sup> Decision of the President of the UOKiK of 31 December 2007, DOK-99/2007.

<sup>86</sup> Decision of the President of the UOKiK of 18 September 2006, DOK-107/06.

<sup>87</sup> Judgment of the Court of Competition and Consumer Protection of 18 December 2002, XVII Ama 19/2001, UOKiK Official Journal 2003, No 2, item 260.

<sup>88</sup> Decision of the President of the UOKiK of 31 December 2007, DOK-99/2007.

<sup>89</sup> Judgment of the Supreme Court of 12 May 2004, III SK 44/04, (2005) 9 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 136.

<sup>90</sup> Judgment of the Supreme Court of 9 August 2006, III SK 6/06, UOKiK Official Journal 2007, No 3, item 39.

<sup>91</sup> Judgment of the Supreme Court of 25 April 2007, III SK 3/07, Lex 365055.

level of choice is as important as prices and quality<sup>92</sup>. If the conduct increases consumer choice, then it does not restrict competition. In contrast, if it limits consumer choice, it restricts competition and is acceptable only if it is justified in light of rules equivalent to Article 81(3) EC. Competition is protected because of the benefits it brings to the consumers<sup>93</sup>. If a certain conduct does not result in such benefits, then it may be considered anticompetitive.

The fact that consumer interests have been emphasised so widely and so frequently, does not lead to the application of Polish antitrust law in a consumer-only oriented way departing from the reality in which markets operate. Not every decrease in consumer choice will be contrary to the Act. Predatory prices applied in order to eliminate competitors or deter potential market entry are prohibited irrespective of the fact that in a short term they bring benefits to consumers and are welcomed by them<sup>94</sup>. More importantly, the impact on consumer interests of a conduct reviewed by the competition authority or the courts has also been taken into account at the stage when a restrictive practice could be justified and escape the prohibition. It was established quite early on that the competition authority must assess whether an alleged restriction of competition was not in fact a conduct that better satisfied consumer needs<sup>95</sup> even though there is no direct reference to consumer interests in the provision imposing a ban on anticompetitive practices (Article 6 of the Act of 1990)<sup>96</sup>. As a result, undertakings could employ practices restricting the economic freedom of other market participants as long as they increased consumer welfare through better quality of services offered, among other things (eg. limitation of the number of garages, repairing cars insured by the dominant insurer, allowed the consumers to benefit from cash-free repair services, financed directly by the insurer)<sup>97</sup>.

The approach associated with the consumer detriment doctrine is also incoherent. On the one hand, the Court has declared that consumer interests will be secured under competitive market conditions. On the other hand, it maintained that competition exists only when consumers have a choice between different offers of varied, independent undertakings, irrespective of how much

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<sup>92</sup> Judgment of the Supreme Court of 19 October 2006, III SK 15/06, (2007) 21-22 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 337.

<sup>93</sup> Judgment of the Supreme Court of 1 April 2004, III SK 24/04, (2005) 2 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 28.

<sup>94</sup> Judgment of the Supreme Court of 14 September 2006, III SK 13/06, (2007) 17-18 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 265.

<sup>95</sup> Judgment of the Antimonopoly Court of 26 April 1995, XVII Amr 67/94, Lex 56343; judgment of the Antimonopoly Court of 15 March 1995, XVII Amr 66/94 (1996) 3 *Wokanda*.

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<sup>97</sup> Judgment of the Antimonopoly Court of 26 April 1995, XVII Amr 67/94, Lex 56343.

would their welfare level improve should the number of market participants or their independence actually decrease<sup>98</sup>.

### **3. The lack of protection against unfair competition**

The jurisprudence of the Antimonopoly Court clarified quite early one that the purpose of the Act of 1990 was not to protect business-owners against unfair competition<sup>99</sup>. No infringement of competition rules could be established if a business conduct had no impact on the competitive structure of the markets or the level of consumer choice. The Court's ruling in another case was therefore correct in stating that one undertaking can exploit the difficult situation of another company, for example by imposing an exclusivity clause<sup>100</sup>, as long as such conduct does not result from the abuse of its market power.

This approach is correct and supports the thesis that the protection of competitors against competition has not been considered as one of the goals of Polish competition law. Even if consumers were harmed by unfair commercial practices, this does not mean that competition as such has been restricted. The fact was also declared to be irrelevant that an undertaking loses its clients attracted to a competitor using unfair business methods. In fact, the claim that an act of unfair competition was committed is in reality indicative of the existence of competition in a given market. There is thus no need for the competition authority to intervene – it is up to the undertaking or undertakings suffering from unfair competition practices to seek damages before a general civil court.

### **4. The lack of consideration of non-economic arguments**

Neither the subject matter of Polish competition law nor the wording of its substantive provisions support the consideration of non-economic arguments (unrelated to competition) when declaring a certain conduct as anticompetitive or when justifying it.

It was declared only accidentally that the application of competition law in the public interest should be seen in a wider perspective and include such assessment of circumstances as the protests of farmers against the pricing policy of one of the undertakings, as an indication of a conduct violating

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<sup>98</sup> Judgment of the Court of Competition and Consumer Protection of 16 November 2005, XVII Ama 97/04, published in: UOKiK Official Journal 2006, No 1, item 16.

<sup>99</sup> Judgment of the Antimonopoly Court of 19 September 1991, XVII Amr 9/91.

<sup>100</sup> Judgment of the Antimonopoly Court of 9 April 1997, XVII Ama 4/97, Lex 56458.

the public interest<sup>101</sup>. Similarly, the Antimonopoly Court justified one of the restrictive practices adopted by the incumbent Polish telecoms operator seeing as it helped to improve network coverage, at a time when one had to wait up to several years for a phone line to be installed<sup>102</sup>.

## 5. Reasonable protection of economic and individual freedom

Initially, when the Act of 1990 was in force, Polish competition law was considered to be designed to protect the freedom of competition against its restraints resulting from the conduct of undertakings<sup>103</sup>. Competition was viewed as the process of rivalry and defined as a situation in which “markets remain open for all on equal terms”<sup>104</sup>. The freedom of economic activity was emphasised as was the freedom to contract, the freedom to choose customers and clients and the freedom to determine the content of the concluded agreements<sup>105</sup>. This traditional approach emphasising the importance of the freedom of competition and the freedom of economic activity can be noted even under the Act of 2000<sup>106</sup>.

This approach is supported by case-law where several references can be found declaring that the purpose of the Act of 1990 is to protect the “independence of market participants and their right to equal treatment”<sup>107</sup>. As a result, a restriction of this independence was deemed to be a restriction of competition<sup>108</sup>. The protection of independence was viewed as “counteracting the use of superior position by undertakings controlling a significant market share”<sup>109</sup>. Forcing dealers to undertake certain obligations under the threat of contract termination was held to be abusive<sup>110</sup>. The same applied to cases in

<sup>101</sup> Judgment of the Supreme Court of 27 August 2003, I CKN 527/01, Lex No 137525.

<sup>102</sup> Judgment of the Antimonopoly Court of 25 January 1995, XVII Amr 51/94, (1995) 12 *Wokanda*.

<sup>103</sup> S. Gronowski, *Ustawa...*, p. 16; Z. Jurczyk, “Cele polityki...”, p. 36.

<sup>104</sup> S. Gronowski, *Ustawa...*, p. 27.

<sup>105</sup> S. Gronowski, *Ustawa...*, p. 25; P. Podrecki: *Porozumienia monopolistyczne...*, p. 14.

<sup>106</sup> R. Molski, “Programy łagodnego traktowania – panaceum na praktyki kartelowe?” (2004) 1 *Kwartalnik Prawa publicznego* 184-185; T. Szancilo, “Porozumienia ograniczające konkurencję” (2006) 8 *Przegląd Prawa Handlowego* 36.

<sup>107</sup> Judgment of the Antimonopoly Court of 10 May 1993, XVII Amr 6/93, (1993) 9 *Wokanda*; judgment of the Antimonopoly Court of 21 May 1993, XVII Ama 9/93, (1993) 12 *Wokanda*.

<sup>108</sup> Judgment of the Antimonopoly Court of 11 December 1996, XVII Ama 59/96, LEX no 56166.

<sup>109</sup> Judgment of the Antimonopoly Court of 21 January 1994, XVII Amr 40/93, unpublished.

<sup>110</sup> Judgment of the Supreme Court of 23 February 2006, III SK 6/05, (2007) 5-6 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 86.

which a dominant undertaking imposed certain methods of payment settling or imposed a duty to use services offered by a specific provider<sup>111</sup>. The restriction of competition found in those cases took the form of “depriving the members of the distribution network of the factual influence on the operation of their businesses”.

Even now competition is understood as the rivalry between independent undertakings seeking to obtain a market advantage over their competitors<sup>112</sup>. In order for competition to be undistorted, supply and demand forces must operate freely, that is, without any restraints<sup>113</sup>. Undertakings must therefore act independently. All concerted actions that are capable of limiting the economic freedom of market participants lead to a prohibited distortion of competition<sup>114</sup>. Any limitation of the independence of decision-making is considered to be an indicator of a restriction of competition<sup>115</sup>.

On the other hand, many cases suggest that a restriction imposed on the economic freedom of another undertaking was not anticompetitive as such; it was considered to be anticompetitive only if it resulted from a conduct “which had its origin in dominant market structures”<sup>116</sup>.

## 6. The lack of protection for competitors

It has been established in this paper, when discussing the public interest doctrine and the enhancement of efficiency, that the protection of competitors is not an accepted goal of Polish competition law. Even in cases where references were made to the restriction of the economic freedom of other companies, the undertakings under consideration operated at a different level of the supply and demand chain – they were neither competitors of the entity resorting to the anticompetitive practice nor parties to the prohibited agreement. During a competition-related analysis in such cases, the most important factor to be taken into account is whether the scrutinised conduct does not discourage

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<sup>111</sup> Judgment of the Supreme Court of 24 April 2003, I CKN 258/01, (2004) 7–8 *Orzecznictwo Sądu Najwyższego – Izba Cywilna*, item 115.

<sup>112</sup> Decision of the President of UOKiK of 4 July 2008, DOK-3/2008; decision of the President of UOKiK of 29 December 2006, DOK-164/06.

<sup>113</sup> Decision of the President of UOKiK of 31 December 2007, DOK-99/2007; decision of the President of UOKiK of 7 April 2008, DOK-1/2008.

<sup>114</sup> Decision of the President of UOKiK of 7 April 2008, DOK-1/2008; decision of the President of UOKiK of 29 December 2006 r., DOK-164/06.

<sup>115</sup> Judgment of the Supreme Court of 12 May 2004, III SK 44/04, (2005) 9 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 136.

<sup>116</sup> Judgment of the Antimonopoly Court of 29 December 1993 r., XVII Amr 42/93, (1994) 5 *Wokanda*; judgment of the Antimonopoly Court of 9 April 1997, XVII Ama 4/97, Lex 56458.

consumers from buying products of other non-dominant undertakings<sup>117</sup>. The interests of undertakings affected by exclusionary conduct are only secondary, as shown by the aforementioned case concerning the exclusive dealing clause used in the context of the yeast market. The clause applied by a company controlling over 50% of the yeast market was found to be anticompetitive because it affected consumer choice. Of secondary importance was the fact that it restricted the ability of undertakings bound by an exclusive dealing contract to compete with multi-brand dealers.

Another example can be found in the case concerning the agreement to cease production of a certain type of petrol concluded between both Polish refiners. This practice was prohibited because it deprived undertakings operating at a wholesale level of the possibility to satisfy still existing consumer demand for this product<sup>118</sup>.

## VI. Conclusions

Cases considered by the competition authority and courts, which have been discussed in this contribution illustrate the lack of a coherent approach to the goals of Polish competition law. However, despite the variety of existing opinions on this topic, the fact that the subject-matter of the statutes forming the core of the Polish competition law system is often mixed up with their function and goals, and that – if identified – the goals show an internal inconsistency in their reasoning (e.g. perfect and effective competition at the same time, economic freedom and efficiency, efficiency and consumer choice, etc.), the result ensuing from this disorderly and disorienting body of case-law seems surprisingly coherent.

Non-dominant undertakings interested in enhancing their efficiency should not fear the competition authority as they can structure their agreements in such a manner as to fall within the scope of one of the existing national block exemptions. Even if they fail to do so, they can justify a restriction of competition resulting from co-operation by meeting the criteria contained in the Polish equivalent of Article 81(3) EC. Companies enjoying a dominant position are in a more difficult situation but even here an efficiency defense has not been ruled out. If a dominant firm can prove that consumer welfare will increase as a result of a conduct under review by the competition authority

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<sup>117</sup> Judgment of the Court of Competition and Consumer Protection of 28 February 2008, XVII Ama 52/07, UOKiK Official Journal 2008, No 2, item 18.

<sup>118</sup> Decision of the President of UOKiK of 31 December 2007, DOK-99/2007.



or courts, even dominant undertakings should be able to escape the prohibition contained in the national equivalent of Article 82 EC.

Nevertheless, all undertakings should consider the following questions: in what way does the conduct applied, or to be applied, affect consumers? Is it in any way beneficial to them? What are the benefits? Will consumers receive at least a share of the benefits resulting from conduct that may be doubtful in the eyes of the competition authority? Why is it so important? All this should be considered in the light of the fact that Polish competition law seems to be very consumer-oriented and generally follows the rule that “what is good for consumers, is good for competition”. This, of course, does not preclude other arguments to be considered but so far consumer welfare seems to be the one accepted most frequently.

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